SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 403

JACK FREDERICK McKART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

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TABLE OF CONTENTS

	PAGE
Citation to the Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
Under Rule 19 (1) (b)	
The Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court and which is in conflict with another Circuit	7
(1) Must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A (sole surviving son) exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?	7
The Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court	13
(2) Does a Selective Service registrant lose his IV-A classification as the sole surviving son of a family whose father was killed in World War II, simply because his mother is deceased and he has no sisters?	13
Conclusion	16

Appendix—

Opinion of Circuit Court 17
Memorandum of Trial Court 24
Judgment of Circuit Court 30

List Of Authorities Cited

Citations:

American School v. McAnnulty, 187 U.S. 94 (1902) 9
Estep v. United States, 327 U.S. 114 (1946) 11
Falbo v. United States, 320 U.S. 49 (1944) 11
Glover v. U. S., 286 F. 2d 84 (CA 8d 1961) 8, 11
Harmon v. Brucker, 355 U.S. 579 (1958) 9
Leedom v. Kyne, 358 U.S. 184 (1958) 8
N.L.R.B. v. Highland Park Mfg. Co., 341 U.S. 322 (1951) 9
Skinner and Eddy Corp. v. U. S., 249 U.S. 557 (1919) 8
Stark v. Wickard, 321 U.S. 288 (1944) 9
United States v. Carson, No. J 67 CR 11 (E.D. Ark. Mar. 13, 1968) 10
Wills v. United States, 384 F. 2d 943 (1967) 11, 12
Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817 (CA 2d 1967) 8, 11
2 American Jurisprudence 2d, p. 441 8

Statutes:

28 U.S.C. § 1254 (1) 3
50 U.S.C. App. § 462 (a) 3
50 U.S.C. App. § 456 (h) 14
50 U.S.C. App. § 456 (o) 3, 9, 13

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JACK FREDERICK McKART,

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UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

Petitioner, Jack Frederick McKart, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on June 14, 1968, in the above entitled cause.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit, printed in Appendix attached hereto, *infra*, page 17, is unreported at the present.

JURISDICTION.

The opinion and judgment of the Court of Appeals were filed and entered on June 14, 1968. On July 9, 1968, Petitioner was granted an extension of time within which to petition for certiorari until August 13, 1968. This Petition for Writ of Certiorari will be timely filed on or before August 13, 1968.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

(1) Must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A (sole surviving son) exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

(2) Does a Selective Service registrant lose his IV-A classification as the sole surviving son of a family whose father was killed in World War II, simply because his mother is deceased and he has no sisters?

STATUTES INVOLVED.

50 U.S.C. App. § 456 (o) provides:

> "(o) Except during the period of a war or a national emergency declared by the Congress after the date of the enactment of the 1964 amendment to this subsection [July 7, 1964], where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces of the United States, or subsequently died as a result of injuries received or disease incurred during such service, the sole surviving son of such family shall not be inducted for service under the terms of this title [sections 451-454 and 455-471 of this Appendix] unless he volunteers for induction."

50 U.S.C. App. § 462 (a) provides in material part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by such fine and imprisonment. . . ."

STATEMENT OF THE CASE.

The Petitioner, Jack Frederick McKart, was indicted under a charge of violating the Universal Military Training and Service Act (50 U.S.C. App. § 462), the indictment alleging that he willfully and knowingly failed to comply with an order of his draft board to report for and to submit to induction into the Armed Forces of the United States on April 21, 1966. He pleaded not guilty and was tried without a jury by the court. On May 16, 1967, the Petitioner was found guilty and subsequently sentenced to three years in jail.

The facts of the case are not in dispute. The Petitioner, who was born on February 13, 1943, was classified I-A on February 26, 1963. On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote to the board stating that as a matter of conscience he could not assist the Selective Service System.

The draft board then sent him forms to be filled out if he sought a conscientious objector classification. It further noted that he might be eligible for a IV-A classification as being the sole surviving son of a family which had its father killed in the Armed Services. In response thereto, the Petitioner refused to make application for a conscientious objector classification but wrote that his "father was killed in the second World War." His draft board cancelled the induction order and classified him IV-A on July 27, 1964, as being a sole surviving son.

In January, 1966, the Petitioner's mother died. The Petitioner was the sole child of that marriage. In February, 1966, the draft board, after consultation with state authorities of the Selective Service System, reclassified the Petitioner I-A. Although he was a sole surviving son, it was Selective Service's position that there was no longer "any family." After he was reclassified I-A, the Petitioner failed to appeal the reclassification and failed to appear for his April 21, 1966, induction.

The trial judge refused to pass on the issue of whether the Petitioner was entitled to a continuance of his IV-A classification, because of the failure of the Petitioner to appeal his classification in February, 1966. The Court felt that Petitioner's conduct meant a waiver of any rights to a IV-A classification and a failure to exhaust his administrative remedies.

The Petitioner was sentenced to three years imprisonment. He appealed. The Court of Appeals for the Sixth Circuit affirmed the trial court (opinion by Phillips, J.) with one judge dissenting (Celebrezze, J.).

The Court of Appeals held that, as the Petitioner had "not appealed his classification through the Selective Service procedures", he could not, in a trial for failure to submit to induction into the Armed Forces, "raise the defense, *upon wholly undisputed facts,* that he was wrongfully classified in violation of the statute." (Appendix, pp. 19-20) (emphasis added).

Judge Celebrezze, in dissent, concluded that "the board's order of induction was not 'pursuant to' the [Selective Service] Act but in contravention of the Act" and that "therefore . . . regardless of how much he [Petitioner] tried, and perhaps even wanted to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried." Judge Celebrezze also stated:

> "This is not a case where the existence of the exemption depends upon the board's first making a factual determination. Here the board had already determined that the Defendant was entitled to the exemption; the termination of that exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.
> I would reverse and dismiss the indictment." (Appendix, p. 24) .

REASONS FOR GRANTING THE WRIT.

(1)

The Court of Appeals for the Sixth Circuit has decided in this case an important question of Federal law, which has not been, but should be, settled by this Court, namely: must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A (sole surviving son) exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

The application of the doctrine of exhaustion of administrative remedies was inappropriate in Petitioner's case because (a) administrative remedies constituted a futile and empty formality; and (b) the issue involved is purely one of law or statutory interpretation.

(a)

There were no questions of credibility or factual dispute to be resolved by an administrative agency in Petitioner's case and the position of the Selective Service System on the significance of his mother's death was well established; namely, that because of it, no family existed of which Petitioner could be the sole surviving son. Thus, he was no longer entitled to his IV-A exemption.

When the sole surviving son amendment was passed by Congress in 1964, Selective Service took the position that no change in the status of the registrant's family would cause a loss of the exemption unless there was the

birth of a full brother (DAA,[1] 15a). This was withdrawn in September, 1964 (DAA, 16a). At Petitioner's trial, the Clerk of the Local Board testified that he was reclassified I-A because "Selective Service headquarters in Columbus" (determined) "that he no longer qualified" (for IV-A), "because the family unit ceased to exist" (DAA, 3a).

The State Headquarters wrote to the National Director on May 10, 1966, requesting advice on the situation. The National Headquarters responded by letter dated June 13, 1966. "Inasmuch as there is no family, it is not believed that he qualified for sole surviving son status." This information was then communicated to Petitioner's local board (DAA, 12a through 14a).

Thus, an appeal to the Selective Service System would have accomplished nothing for the Petitioner. Its position was clear and established.

Where exhaustion of administrative remedies would be a fruitless and empty formality, exhaustion is not required. *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Skinner and Eddy Corp.* v. *U. S.*, 249 U.S. 557 (1919); *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (CA 2d, 1967) and *Glover* v. *U. S.*, 286 F. 2d 84 (CA 8th, 1961). Also see 2 AMERICAN JURISPRUDENCE 2d, p. 441:

> "Where it plainly appears that the administrative remedy would be of no value and fruitless, the party seeking judicial relief does not have to complete administrative procedure before resorting to the courts, particularly where the administrative agency is powerless to afford relief . . . under the rules and

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[1] The symbol, DAA, in this Petition, refers to the Appendix of the Defendant-Appellant filed below.

regulations as promulgated by the head of the department . . ."

(b)

The issue here is solely one of law or statutory construction. The Court of Appeals for the Sixth Circuit concluded that the facts were "wholly undisputed".

The Selective Service System erroneously construed the law in Petitioner's case and upon the erroneous construction reclassified Petitioner I-A and ordered him to report for induction. This course of action was completely outside the jurisdictional power of Selective Service. § 456 (o) of Title 50, App., provides that ". . . the sole surviving son of such family [the father of which was killed in action] *shall not* be inducted . . ." (emphasis added). Yet Petitioner's draft board acted in clear violation of the above statute in reclassifying him I-A and in ordering him to report for induction.

This Court has, in the past, granted judicial relief to those who have been injured by an act of a government official which is in excess of his express or implied powers. *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Stark* v. *Wickard*, 321 U.S. 288 (1944); *American School* v. *McAnnulty*, 187 U.S. 94 (1902).

In *N.L.R.B.* v. *Highland Park Mfg. Co.*, 341 U.S. 322 (1951), this Court refused to allow the question of standing to bar its review of an order which was totally invalid, prohibited by law, and beyond the jurisdiction of the N.L.R.B.

> "It would be strange indeed if the courts were compelled to enforce, without inquiry, an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct.

> The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U.S. at 325 326.

For the same reasons, the courts cannot allow an invalid Selective Service order, based solely on an erroneous interpretation of law, to go unreviewed simply because of a failure to exhaust administrative remedies.

On the same basis, the Courts of Appeals and the District Courts have applied this principle when the doctrine of exhaustion of administrative remedies has been used in an attempt to bar consideration of a pure question of law where there is no factual dispute.

> "The District Court is not an appellate court for reviewing draft board decisions. In cases involving disputed factual findings the scope of review is quite narrow, and if there is any basis in fact for the decision of the Board, a registrant's failure to appeal that decision would prevent his attacking it in the courts. However, there is no factual dispute here. The only question, on the basis of the file and stipulation, is whether the undisputed facts entitle the defendant to a I-O classification. The experience of the administrative boards and agencies will generally render them better equipped than the courts to solve factual problems within their respective fields, but, as stated in *Wills* v. *U. S.*, 384 F. 2d 943, where the dispute is on a question of law, 'the exhaustion rule loses much of its force . . .'" *United States* v. *Carson*, No. J 67 CR 11 (E.D. Ark. Mar. 13, 1968).

In recent cases, the Courts of Appeals have followed this position under similar circumstances. *Wills* v. *United States,* 384 F. 2d 943 (1967); *Wolff* v. *Selective Service Local Board No. 16, supra;* and *Glover* v. *United States, supra.*

The Sixth Circuit Court of Appeals relied upon *Falbo* v. *United States,* 320 U.S. 549 (1944) as interpreted by *Estep* v. *United States,* 327 U.S. 114 (1946) to preclude Petitioner from questioning the validity of his Selective Service order because of failure to exhaust his administrative remedies (Appendix, p. 20). Petitioner maintains that *Falbo* and *Estep* are not relevant in this matter, because they involved factual determinations by local boards within the competency and jurisdiction of those boards. In those cases there was no question that the boards had the authority to resolve the facts in dispute. In the present case there is no dispute of fact and the issue is purely one of law, which the courts are equally as competent, if not more competent, to determine. In fact, it is the duty of the courts to review an erroneous interpretation of Selective Service. With no factual dispute and with a pure issue of law, the doctrine of the exhaustion of administrative remedies as enunciated in *Falbo* and *Estep* simply does not apply.

In particular, the Sixth Circuit Court of Appeals relied upon the assumption that Petitioner might have failed his physical examination at the induction center (Appendix, p. 21). Whether or not this would have occurred is an irrelevant consideration, since Petitioner had already failed to exhaust his administrative remedies by not appealing his reclassification. Even if Petitioner had reported for induction and taken the physical examina-

tion his failure to appeal his reclassification would have constituted a failure to exhaust administrative remedies. Furthermore, to bar the Petitioner from challenging his invalid reclassification and subsequent induction order, solely on the basis of his failure to take a physical examination required as a result of that invalid reclassification, is illogical and unfair.

The question of the application of the doctrine of exhaustion of administrative remedies must be determined by this Court, because of a conflict between the Ninth Circuit and the Sixth Circuit. The Ninth Circuit, in *Wills* v. *United States, supra,* stated that there is little reason to defer to administrative process where a question of law, namely, a claim of constitutional right, is involved and there is no question of fact, 384 F. 2d at 945 (1967). In that case, the Court held that the Defendant was not barred by his failure to exhaust his administrative remedies.

The Sixth Circuit attempted to distinguish *Wills* in its opinion (Appendix, p. 22). However, a comparison of the opinion in each reveals that the Ninth Circuit takes the position that the failure to exhaust administrative remedies is not necessary where a question of law only is presented, while the Sixth Circuit takes the position that a failure to exhaust administrative remedies is fatal regardless of the question involved.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal law and resolve the conflict on this issue prevailing between the Sixth and the Ninth Circuits.

(2)

For the first time, this Court is being asked to determine the question of whether a registrant loses his right to exemption as a sole surviving son when he has no parents or sisters living.

Because of their position that the Petitioner's failure to exhaust his administrative remedies barred any defense in the criminal proceeding, the Courts below did not decide or discuss the question of whether his Local Board's change of classification from IV-A to I-A, upon the death of his mother, was erroneous.

The statute (50 U.S.C. App. § 456 (o)) provides as follows:

> "Where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces . . ., the sole surviving son of such family shall not be inducted for service . . ."

Petitioner maintains that he is entitled to the exemption as a sole surviving son by reason of the death of his father during World War II and that the subsequent death of his mother did not deprive him of the right to that exemption.

Selective Service insists that the right to the exemption ceases when there are no parents or sisters living, because there is no "family" left (DAA, 16a).

This position is not supported by an analysis of the words of the statute or the purpose of the statute.

The statute itself does not recite that the right to this exemption ceases, when no parents or sisters are living. Congress would have recited such a condition if

it intended that there be one. Further, Congress carefully stated the only three conditions which would terminate the right to the exemption, in the statute, namely a declaration of war, a declaration of national emergency, or volunteering for service. Any additional conditions that Congress intended would have been so stated.

When Congress intended to condition an exemption or deferment by requiring the existence of a family relationship, it did so expressly, as in 50 U.S.C. App., § 456 (h), which states that registrants with children and a wife "with whom they maintain a bona fide *family relationship* in *their homes.*" (emphasis added) are entitled to a III-A or hardship deferment. § 456 (o) has no requirement that a family relationship with parents or sisters exist for registrants to be classified as sole survivors.

The interpretation placed upon this statute by Selective Service assumes that the only purpose of this exemption is to spare the surviving son to comfort and support the parents or sisters (DAA, 16a). Petitioner agrees that this is one purpose of the statute, but not the only one. There is the further purpose of leaving a male heir to carry on the name of the family. Also, Congress wanted to spare all members of the family, including the registrant, any more pain and suffering which might be caused by military service. Another purpose of the statute was to relieve a family of any further military duty, because it had borne more than its share of civic responsibility in the defense of the nation by the prior death or deaths. On the basis of these multiple purposes, Petitioner was still entitled to his exemption at the death of his mother.

If the sole purpose of the statute was to have the sole surviving son comfort the surviving parent(s) and sisters,

then the statute ought to require that he live with them. The statute has no such requirement and the Selective Service does not interpret the statute so as to make such a requirement. That, therefore, cannot be the sole purpose.

Selective Service originally agreed with the position of Petitioner in Operations Bulletin No. 263 (DAA, 15a). Later, this Bulletin was rescinded (16a). The legislative history of the statute makes no mention of the necessity of the existence of a family for obtaining the exemption (DAA, 17a-20a). The history shows only that Congress wished to spare the sole surviving son of a father who died as a result of military action. The position is further supported by the statement of Congressman Huber, who introduced the original statute in 1948, 1964 U.S. Code Congressional and Administrative News, Volume 2, page 2540.

On the basis of this analysis and history, Petitioner maintains that this interpretation of the statute is unfounded and that the reclassification of Petitioner to I-A from IV-A was arbitrary and capricious.

No prior decision on this question has come to the attention of Counsel for Petitioner. The United States Armed Forces suffered 292,131 battle deaths during World War II, 33,629 battle deaths during the Korean War and over 25,000 battle deaths to date of the filing of this Petition in Viet Nam. These figures are only indicative of the thousands of males and their families who will be affected by a decision on this question.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal law.

CONCLUSION.

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

No. 18194

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK FREDERICK MCKART,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided June 14, 1968.

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

PHILLIPS, Circuit Judge. This case arises out of the failure and refusal of Jack Frederick McKart to comply with an order of his local draft board to report for and submit to induction into the Armed Forces of the United States. He was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act. 50 U.S.C. App. § 462. He waived a jury trial, was found guilty by the District Judge and was sentenced to a prison term of three years.

McKart's indictment and trial were preceded by a long and somewhat complicated history of dealings with his local draft board. He was born February 13, 1943. Shortly after his eighteenth birthday he completed and filed his Selective Service questionnaire. His local board classified

him I-A and notified him accordingly on February 26, 1963. McKart made no attempt to appeal his classification.

On March 23, 1964, he was ordered to report for a pre-induction physical examination on April 21. He failed to report. On May 1, 1964, the draft board ordered him to report for induction on May 11. Again he failed to report. Instead he wrote a letter stating his refusal to submit to induction and expressing his total antipathy for the Selective Service System. He said that he did not believe in killing; that the Selective Service system violated his beliefs; and that he therefore refused to have anything to do with it. He objected to conscription as slavery, stating: "I refuse to serve this country armed, and I refuse to serve it unarmed by doing alternative service."

The draft board replied by furnishing McKart the special form for conscientious objector and suggesting that he complete the form and return it. The board also stated in its letter that McKart's original questionnaire had indicated that he was the sole surviving son of a family of which one or more members were killed in action or died in the line of duty, and asked for further information. On May 20, 1964, McKart returned the blank form to the board making it clear that he did not wish to become classified as a conscientious objector, saying: "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated:

> "If I indicated that I was a 'Sole Surviving Son' when I filled out your forms around my eighteenth birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

Although McKart did nothing to claim an exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him

IV-A. From July 27, 1964, until February 14, 1966, McKart remained in the IV-A classification.

Early in 1966 the board learned of the death of McKart's mother. His classification was changed from IV-A to I-A. When McKart was informed of this reclassification, he made no effort to appeal. Subsequently he was ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966. He failed to comply with either of these orders.

At the trial McKart attempted to defend his refusal to report for induction on the ground that he still is entitled to a IV-A classification as a sole surviving son under 50 U.S.C. App. § 456(o). In a well-reasoned memorandum opinion, District Judge David S. Porter held that the failure of McKart to exhaust his administrative remedies within the Selective Service System barred him from raising the validity of his classification as a defense in the criminal proceeding. Judge Porter said:

> "Of course, he had not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System.
>
> • • • • •
>
> ". . . The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to him. He simply rejected the whole idea of the draft. . . ."

On appeal McKart's theory is that a Selective Service registrant is not required to exhaust his administrative remedies when the issue of classification is purely one of law and the position of the Selective Service is so well established that an appeal would be futile.

The issue before us is this: When a Selective Service registrant who has not appealed his classification through the Selective Service procedures is tried for failure to submit to induction into the Armed Forces, may the reg-

istrant raise the defense, upon wholly undisputed facts, that he was wrongfully classified in violation of statute? We answer this question in the negative and affirm the conviction.

In *Falbo* v. *United States;* 320 U.S. 549, the defendant, a conscientious objector, was tried for willful failure to report for assignment to work of national importance. Falbo defended on the ground that he was entitled to a statutory exemption from all forms of national service. The defendant Falbo challenged the order of his local board before he had exhausted his administrative remedies. The Supreme Court held that Falbo could not raise this defense. After the decision in *Falbo,* many courts held that, even after exhaustion of administrative remedies, a registrant could not defend a criminal prosecution on the ground that the board lacked jurisdiction to impose the classification. Indeed, most courts held that judicial review of an erroneous classification could be had only in a habeas corpus proceeding after induction.

In *Estep* v. *United States,* 327 U.S. 114, the Supreme Court held that the defense of an invalid classification may be raised in a criminal prosecution where the registrant has exhausted all administrative remedies, reported for induction, was accepted, but refused to submit to induction. In *Estep* the Court emphasized that the defendant in *Falbo* had not exhausted his administrative remedies:

> "*Falbo* v. *United States, supra,* does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." 327 U.S. at 123.

(Appendix)

The requirement that judicial review of a registrant's classification must await both the full exhaustion of administrative remedies and acceptance for induction is founded on the policy of mobilizing national manpower in the shortest practicable period. *Falbo* v. *United States, supra,* 320 U.S. 549, 554. Until the registrant reports and is accepted for induction there is always the possibility that he may be rejected because of his physical condition or perhaps an erroneous classification may be changed. In *United States* v. *Irons,* 369 F. 2d 557, 558-59 (6th Cir.), Judge Mathes said:

> "Not only did appellant spurn all administrative remedies available to him, including appeal, [cf. *Maddox* v. *United States,* 264 F. 2d 243 (6th Cir. 1959)]; he also refused to report for, or submit to a physical examination. Conscientious objectors are not excused from a physical examination. Indeed, no registrant is, and for good reason. [See Selective Service Regs. § 1628.11, 32 C.F.R. §.1628.11 (1965 Supp.).] Even if improperly classified I-A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as 4-F. Where that is the result, all constitutional and other problems incident to I-A classification disappear of course, *eo instanti.* [See: *Falbo* v. *United States,* 320 U.S. 549, 553, 64 S. Ct. 346, 88 L. Ed. 305 (1944); *Moore* v. *United States,* 302 F. 2d 929 (9th Cir. 1962); *United States* v. *Balogh,* 160 F. 2d 999 (2nd Cir. 1947).]
>
> "The same policy requires every registrant to report for induction as ordered, even though he may have valid legal grounds for refusing to submit to induction. [Cf.: *Estep* v. *United States, supra,* 327 U.S. 114, 66 S. Ct. 423; *Williams* v. *United States,* 203 F. 2d, 85, 88 (9th Cir. 1953).]"

Accord, *Moore* v. *United States*, 302 F. 2d 929 (9th Cir.); *Breen* v. *Selective Service Board*, ... F. Supp. ....., 36 U.S.L.W. 2597 (D. Conn.).

In support of the view that administrative remedies need not be exhausted before the validity of a classification is subject to judicial review, appellant relies on the cases of *Wills* v. *United States*, 384 F. 2d 943 (9th Cir.), cert. denied ..... U.S. .....; and *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (2d Cir.).

In *Wills* a registrant was permitted in a criminal proceeding to attack his reclassification without first exhausting his remedies of appeal within the Selective Service System. The local draft board did not mail the registrant his notice of delinquency until long after the expiration of the ten day period for appeal from his subsequent reclassification. The reclassification was found to be not in accordance with the procedure contemplated by the regulations. The Ninth Circuit held that "Knowledge of his delinquency status and impending induction would thus be relevant to appellant's decision whether to appeal, and the board's failure to disclose this fact at the proper time cannot be said to be without consequence to that decision."

In *Wolff* two college students were reclassified from II-S to I-A because they participated at the offices of a Selective Service board in a protest against American involvement in Vietnam. The two students sought to enjoin their local board from reclassifying them. In approving the injunction against the board, the Second Circuit summarized the basis of its action as follows:

> "The two local boards did act without jurisdiction, the record shows that attempts to secure relief within the Selective Service System would be futile, and the threat to First Amendment rights is of such immediate and irreparable consequence not simply to these students but to others as to require prompt

action by the courts to avoid an erosion of these precious constitutional rights. Under this combination of circumstances an injunction could properly issue." 372 F. 2d at 820.

Relying upon the rationale of *Dombrowski* v. *Pfister*, 380 U.S. 479, the Court held that injunctive relief prior to the exhaustion of administrative remedies was warranted because the effect of the reclassification was to curtail immediately the exercise of the First Amendment rights.

It is apparent that the principles applied in *Wills* and *Wolff* are inapplicable to the present case. In making his decision whether to appeal McKart was neither stifled nor misled by the action of his board. Nor does McKart purport to show that his classification by the board was undertaken as an attempt to curtail the exercise of his freedom of speech or any other Constitutional right.

We do not pass upon the question as to whether McKart would have been entitled to a IV-A classification under 50 U.S.C. § 456(o) if he had exhausted his administrative remedies.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting: Regretfully I cannot agree with the conclusion of my brethren in this case. It is clear that the Defendant had every intention to violate the Selective Service Act, but the fact is that he had no duty under any "directions made pursuant to" the Act that he could be guilty of failing to perform.

Defendant was indicted and tried for failing "to comply with an order of his local board to report for and submit to induction . . ." Section 456(o) of Title 50, App., provides that ". . . the sole surviving son of such family [the father of which was killed in action] *shall not* be inducted . . ." (emphasis added). The local draft board recognized at one time that the Defendant came under this exemption. When the Defendant's mother died, the

board decided that the exemption no longer applied because, in their opinion, there was no "family" left. In my view, that decision was contrary to the clear wording of the statute and to the clear intent of Congress in providing for the exemption. Hence, I conclude that the board's order of induction was not "pursuant to" the Act but in contravention of the Act. Therefore, I can only conclude that regardless of how much he tried, and perhaps even wanted, to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried.

This is not a case where the existence of the exemption depends upon the board's first making a factual determination. Here the board had already determined that the Defendant was entitled to the exemption; the termination of that exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.

I would reverse and dismiss the indictment.

MEMORANDUM OF DECISION
(Filed May 16, 1967)

PORTER, J.: Defendant was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act in that he failed to comply with an order of his local board to report for and submit to induction into the Armed Forces of the United States. Title 50 App., Section 462, United States Code. He pleaded not guilty, waived a jury trial, and his case was heard by the Court.

The facts are not in dispute and for the most part may be verified by examining the draft board's file (PX 1).

(Appendix)

From this and the testimony, it will be seen that the defendant, whose birthday is February 13, 1943, filled out a questionnaire on his eighteenth birthday. He was not classified until he was twenty years of age. He was classified 1A, and, on February 26, 1963, notified accordingly. No appeal was taken. He was ordered to report on April 21, 1964 for a preinduction physical examination. He failed to report.

On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote the first of three or four letters (PX 1A) saying in substance he refused to report and stating his reasons. Briefly, his reasons were that he did not believe in killing; that the Selective Service System violated his belief; and he therefore refused to have anything to do with it. He also objected to conscription as slavery.

The draft board replied by sending forms for the defendant to fill out if he sought a CO status. It also stated that it was noted that the defendant indicated on his original questionnaire that he was the sole surviving son of a family which had a father, son or daughter killed while serving in the Armed Services and asked for information.

The young man replied under date of May 20, 1964, returning the form and making it clear he did not wish to become classified as a conscientious objector. "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated: "If I indicated that I was a 'sole surviving son' when I filled out your forms around my eighteenth birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

(Appendix)

While the defendant did nothing to claim the exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him 4A around July 27, 1964. On February 4, 1966, it came to their attention that the boy's mother died. After some correspondence with state and national authorities, they reclassified him 1A, and they ordered him to report on February 24, 1966 for a preinduction physical some time in March, 1966.

On March 12, 1966 the defendant wrote and said he would not report. On March 31, 1966 he was ordered to report on April 21, 1966 for induction. On April 20, 1966 he wrote a letter explaining that he had no intention of doing so. He did not report on April 21, 1966 and was declared delinquent.

At no time did the defendant appeal any order of the Board, and specifically he did not appeal the order that he report for induction April 21, 1966.

Of course, he has not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System. The defendant did not take the stand and offered no testimony in his own behalf. Hence, the foregoing statement of facts are not contradicted, and the defense offered in his behalf is strictly legal.

It has three parts: first that he is entitled to a 4A classification as a matter of law as a sole surviving son; second, that his classification as 1A by the board was an act in excess of their jurisdiction; and third, he contends that since he is entitled to a 4A classification as a matter of law, he is excused from the requirement that he must exhaust his administrative remedies.

In considering these arguments the case has been treated as if the defendant had claimed the 4A classification. The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to

him. He simply rejected the whole idea of the draft and persisted in this stand when his mother died and the draft board changed his classification to 1A.

In an Order denying a motion for an injunction in *Muhammad Ali* v. *Breathitt*, dated April 17, 1967 (No. 17,834, United States Court of Appeals for the Sixth Circuit) the Court said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service."

The Court went on to say:

> "If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the Armed Forces with much-needed personnel."

Much the same common sense reasoning is behind the authorities on which the conclusions of law are based that the defendant cannot raise the legal question he does without first showing that he exhausted his administrative remedies. These cases are *Sicurella* v. *United States*, 348 U.S. 385 (1955); *Sunal* v. *Large*, 332 U.S. 174 (1947); *Cox* v. *United States*, 332 U.S. 442 (1947); *Estep* v. *United States*, 327 U.S. 114 (1946); *Gibson* v. *United States*, 329 U.S. 338 (1946); *Billings* v. *Truesdell*, 321 U.S. 542 (1944); *Falbo* v. *United States*, 320 U.S. 549 (1944). See also, *Pickens* v. *Cox*, 282 F. 2d 784 (10 Cir., 1960).

In *Pickens*, the defendant was inducted into the Army in 1953. In 1954 he was tried before a General Court Martial and sentenced to a dishonorable discharge and confinement for ten years. Pickens petitioned for a writ of habeas corpus on the ground that the Army had no

jurisdiction over him because he was a sole surviving son at the time of his induction, though he did not inform his local board of that status and had never applied for a release from the military on that account. The Court held the burden was upon the registrant to bring himself within any exemption specified within the Selective Service Act. Where the Act declares that sole surviving sons "shall not be inducted," this phrase does not create a disability in the Selective Service Board nor deny it the power to induct, but merely creates a personal privilege or right to exemption in the individual. "Exemption from military service is a matter of legislative grace. The burden is upon the registrant to claim and establish the right to exemption and the exemption may be waived or abandoned like any other personal privilege." *Ibid,* p. 785.

As to the contention that the defendant is entitled to the classification 4A as a matter of law, it should be noted that every defense based on improper classification (in a criminal prosecution under the Selective Service Act) is actually a question of law. When the defense is presented and the trial court is asked to review the administrative board's decision, the criterion is whether there was a basis in fact for the decision, and not whether the trial court would have made the decision. In *Cox* v. *United States, supra,* the Court held that in a criminal prosecution the jury cannot pass on the validity of an administrative order, the question being one for the court, since it is a question of law and not of fact.

An error of law may be a basis for a defense, but only when the defendant has exhausted his administrative remedies. *Sicurella* v. *United States, supra.*

Defendant cites *Estep* in support of his position, but the Court finds this case within the facts of *Falbo* and *Billings,* rather than *Estep.*

It remains only to say on the main point, whether this defendant was required to exhaust his administrative remedies that in Selective Service cases the rule is stricter than it is in other areas of the law, and for good reason, since the idea is to get men into the Army as quickly as possible. Where there is still a chance the Service itself may reject them (as by a physical) then there is no reason for judicial review. Hence, cases involving the futility of administrative remedies in other areas, such as labor law, are not deemed applicable.

This is dispositive and makes unnecessary a consideration of the correctness of the defendant's reclassification following the death of his mother. It should suffice to show why the Court cannot agree with the contentions of the defendant, and why the Court's general finding is that he is guilty.

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 18,194

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK FREDERICK McKART,

Defendant-Appellant.

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

JUDGMENT

Appeal from the United States District Court for the Southern District of Ohio

This Cause came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
/s/ Carl W. Reuss
Clerk